

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2008-415-C

IN RE:)	
)	
Sandi Perry,)	
Complainant/Petitioner,)	
)	
v.)	
)	
BellSouth Telecommunications, Inc.)	
d/b/a AT&T South Carolina,)	
)	
<u>Defendant/Respondent.</u>)	

**AT&T SOUTH CAROLINA’S MOTION TO STRIKE REQUEST FOR CLASS
CERTIFICATION AND RESPONSE TO MS. PERRY’S “REPLY TO AT&T’S
ANSWER AND AMENDMENTS”**

BellSouth Telecommunications, Inc. d/b/a AT&T South Carolina (“AT&T South Carolina”) respectfully submits its Motion to Strike Request for Class Certification and Response to Ms. Perry’s Reply to AT&T’s Answer and Amendments filed in this docket. Ms. Perry’s latest submission appears to first reply to certain parts of AT&T’s Answer filed in this docket on December 18, 2008 (“Reply”), and in the section titled “AMENDMENTS TO THE COMPLAINT”, it appears to amend some of the allegations in her original Complaint filed in this Docket on November 6, 2008 (“Amendments”). AT&T South Carolina submits its Motion, and, in an abundance of caution, responds to all of the allegations in Ms. Perry’s Reply and Amendments as set forth below.

I. MOTION TO STRIKE REQUEST FOR CLASS CERTIFICATION

AT&T South Carolina respectfully submits its Motion to Strike Request for Class Certification on the following grounds: (1) this request is outside the jurisdiction of the

Commission, and (2) in the alternative, and without waiving the foregoing, Ms. Perry is unable to satisfy the requirements for class certification found in Rule 23 of the South Carolina Rules of Civil Procedure.

A. Background

In her Reply, Ms. Perry states that she would like to be certified as a class representative “of all consumers who received an AT&T rebate card”. She further states that she was “induced to obtain internet service by the offer of a \$50 rebate.” In her Complaint, Ms. Perry alleges that she “only received a \$45 rebate” instead of a \$50 rebate because she was charged a “payment convenience fee” of \$5.¹ AT&T South Carolina has admitted in its Answer that it provided Ms. Perry with a \$50 rebate card, that she used the card to pay her bill with the assistance of an AT&T representative, and that she was charged a \$5.00 payment convenience fee after being informed that the charge would apply if she paid the bill in that manner.²

B. Commission Jurisdiction

The Commission has only the jurisdiction that has been conferred upon it by statute,³ and no statute authorizes the Commission to certify a class or hear a class action. Accordingly, Ms. Perry’s request to be certified as a class representative should be denied because the Commission has no jurisdiction to grant the request.

C. Requirements of a Class Action in South Carolina

In the alternative, and without waiving the foregoing, Ms. Perry cannot satisfy the requirements for a class action contained in Rule 23 of the South Carolina Rules of Civil

¹ See Complaint at ¶ 1.

² See Answer at ¶ 1.

³ See *Black River Elec. Coop., Inc., v. Pub. Serv. Comm’n.*, 238 S.C. 282, 120 S.E.2d 6, 11 (SC 1961).

Procedure. A member of a class may sue as a representative party on behalf of all only when the court finds the following:

- (1) the class is so numerous that joinder of all members is impracticable,
- (2) there are questions of law or fact common to the class,
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class,
- (4) the representative parties will fairly and adequately protect the interests of the class, and
- (5) in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class.⁴

It is well settled that *pro se* litigants in general cannot adequately protect the interests of other unrepresented litigants.⁵ It is even more clear that this particular *pro se* litigant cannot adequately protect the interest of other members of a purported class. In Docket No. 2006-294-C, Ms. Perry filed a motion asking the Commission to appoint counsel to represent her in that docket, explaining that “[s]he herself did not go to law school, but merely hung around the USC Law Library; she is not competent in this

⁴ See S.C. R. Civ P. 23.

⁵ See *Oxendine v. Williams*, 509 F.2d 1405 (4th Cir. 1975) (stating that the “[a]bility to protect the interests of the class depends in part on the quality of counsel, and we consider the competence of a layman representing himself to be clearly too limited to allow him to risk the rights of others) (citation omitted); *Myers v. Loudoun County Pub. Sch.*, 418 F.3d 395, 400 (4th Cir. 2005) (noting that prohibiting a *pro se* litigant from litigating others’ claims protects “the rights of those before the court” and “jealously guards the judiciary’s authority to govern those who practice in its courtrooms”) (citations omitted); *Jacobs v. U.S. Treasury IRS*, 2008 WL 5114407 (D.S.C. 2008) (holding that *pro se* plaintiff could not represent other *pro se* litigants); *Glover v. City of Orangeburg*, 2008 WL 961752 (D.S.C. 2008) (stating “it is well settled that a *pro se* litigant may not represent others in a civil action”).

In addition, Ms. Perry will not be able to identify enough people to form a class because the legal issues and factual allegations presented in her Complaint are so unique matter.”⁶ It is clear, therefore, that Ms. Perry cannot “fairly and adequately protect the interests” of any alleged class.⁷to her situation. Commonality and typicality are fundamental requirements of Rule 23 of the South Carolina Rules of Civil Procedure. The requirement of commonality among class members “is met only where the class shares a determinative issue.”⁸ The typicality requirement has been simply described as follows: “as goes the claim of the named plaintiff, so go the claims of the class.”⁹

Ms. Perry’s Complaint presents highly individualized outcome-determinative questions. Clearly, even if the Commission could entertain class claims, she could not satisfy the prerequisites of commonality and typicality. In her Reply and Amendments, for instance, she alleges that she was “induced to obtain internet service by the offer of a \$50 rebate.” Such reliance-based claims generally do not satisfy the requirements of Rule 23 because the individualized proof requirements of these claims make it impossible

⁶ See Complainant’s Motion To Be Appointed An Attorney at p. 1, Docket No. 2006-294-C (filed on 1/9/07).

⁷ Additionally, a class representative generally is required to provide notice of the action to absent class members. See S.C. R. Civ. P. 23(d)(2). Ms. Perry stated in her Reply and Amendments that she cannot afford to make multiples copies of pleadings and that she is using email to save money on postage. It is doubtful, therefore, that Ms. Perry could provide adequate notice to potential class members as required by Rule 23(d)(2).

⁸ *Gardner v. Dep’t of Revenue*, 353 S.C. 1, 21-22, 577 S.E.2d 190, 200-201 (2003) (citing *Stott v. Haworth*, 916 F.2d 134, 145 (4th Cir.1990) (“certification is proper only when a determinative critical issue overshadows all other issues; and “question[s] [that are] in no way dispositive and [which] simply propel the action into a posture where judicial scrutiny is necessary for just adjudication” are insufficient to establish commonality under Rule 23(a)(2), FRCP); and *Peoples v. Wendover Funding Inc.*, 179 F.R.D. 492, 498 (D.Md.1998) (“a representative plaintiff cannot establish commonality ... if the court must investigate each plaintiff’s individual claim.”)).

⁹ *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 340 (4th Cir. 1998) (discussing the corresponding federal rule).

for the class-action proponent to show commonality and typicality.¹⁰ Just as the plaintiffs in the *Gardner* case could not establish commonality with respect to the outcome-determinative claim of prejudice, so Ms. Perry could not establish commonality with respect to the outcome determinative claim of detrimental reliance.¹¹

Ms. Perry's Complaint also presents facts that are highly specific to her situation. The \$50 rebate card provided to Ms. Perry by AT&T South Carolina is a VISA gift card that was available to qualifying customers subscribing to certain Internet services.¹² The \$5 payment convenience fee is charged to customers paying their telephone bill by telephone with the assistance of a customer service representative.¹³ Customers receiving a VISA gift card are not limited to using the gift card to pay their telephone bill by telephone, and in fact customers can use the gift card anywhere VISA is accepted.¹⁴ Further, if Ms. Perry wishes to represent a class based on all the allegations in her Complaint rather than only the allegations related to the rebate card, it will be even more difficult to identify any others similarly situated to Ms. Perry. For example, Ms. Perry alleges in her Complaint that certain late payment charges and refunds issued to her by AT&T South Carolina are inaccurate.¹⁵ These allegations are specific to Ms. Perry and her account, and she will be unable to identify anyone in a factually similar situation.

Finally, the South Carolina Rules of Civil Procedure require that in an action for monetary damages, each class member must have an amount in controversy that is at

¹⁰ See *id.* at 341-342.

¹¹ See *Gardner v. Dep't of Revenue*, 353 S.C. 1, 577 S.E.2d 190 (2003).

¹² See Affidavit of Robin Moore at ¶4, at Exhibit A.

¹³ See Affidavit of Robin Moore at ¶5, at Exhibit A.

¹⁴ See Affidavit of Robin Moore at ¶6, at Exhibit A.

¹⁵ See *e.g.*, Complaint at ¶ 2 alleging that AT&T South Carolina improperly charged Ms. Perry late payment charges in the amount of 40 cents and 57 cents.

least \$100.¹⁶ Ms. Perry's alleged damage in regard to the rebate card is in the amount of \$5.¹⁷ Therefore Ms. Perry and those she requests to represent in a class action would not meet the amount in controversy requirement for a class action under the South Carolina Rules of Civil Procedure.

For all the reasons stated above, Ms. Perry's request to be certified as a class representative should be stricken from her Complaint and her Reply to AT&T's Answer and Amendments.

II. RESPONSE TO MS. PERRY'S REPLY

AT&T South Carolina responds to Ms. Perry's Reply as follows, subject to the reservations of rights and affirmative defenses asserted in AT&T South Carolina's Answer:

1. AT&T South Carolina relies on its Answer in regard to Ms. Perry's allegations in relation to the rebate card, and denies that Ms. Perry was "forced" to use the rebate card, or that her choice to use the rebate card was "not a freely made choice".
2. AT&T South Carolina continues to assert that Ms. Perry cannot represent anyone in these proceedings other than herself. AT&T South Carolina relies on its Answer as well as its Motion to Strike Request for Class Certification (above) in regard to Ms. Perry's request to be a certified representative of a class.
3. AT&T South Carolina relies on its Answer and continues to assert that the Commission lacks jurisdiction over some or all of Ms. Perry's claims, and

¹⁶ S.C. R. Civ. P. 23(a)(5); *see also Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 404 S.E.2d 200 (1991).

¹⁷ *See* Complaint at ¶ 1.

therefore reserves its rights to move for dismissal and/or summary judgment of some or all of her claims.

III. RESPONSE TO MS. PERRY'S AMENDMENTS

In response to Ms. Perry's Amendments, AT&T South Carolina respectfully answers those allegations as follows, subject to the reservations of rights and affirmative defenses asserted in AT&T South Carolina's Answer.

4. In response to the allegations set forth in numbered Paragraph 1(a) of the Amendments, AT&T South Carolina admits that it appropriately charged Ms. Perry a \$.58 late payment charge on her December bill. To the extent Ms. Perry alleges that a late payment charge on her December bill is improper, AT&T South Carolina denies the allegations.
5. In response to the allegations set forth in numbered Paragraph 1(b) of the Amendments, AT&T South Carolina admits that it voluntarily refunded Ms. Perry \$4.80 in response to Ms. Perry's request to change her unregulated Internet services plan to a plan that cost less than that to which she previously subscribed. To the extent Ms. Perry alleges that this refund was improper, AT&T South Carolina denies the allegations.
6. In response to the allegations set forth in numbered Paragraph 2(c) of the Amendments, AT&T South Carolina is unable to respond at this time due to the vagueness of the allegations. However to the extent that Ms. Perry is alleging she was charged or refunded amounts that were incorrect or improper, AT&T South Carolina denies the allegations.

Respectfully submitted this 5th day of February, 2009.

By: Patrick W. Turner
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ATTORNEY FOR AT&T SOUTH CAROLINA

727306

EXHIBIT A

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2008-415-C

IN RE:)	
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Sandi Perry,)	
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BellSouth Telecommunications, Inc.)	
d/b/a AT&T South Carolina,)	
)	
<u>Defendant/Respondent.</u>)	

**AFFIDAVIT OF ROBIN MOORE IN SUPPORT OF AT&T SOUTH
CAROLINA'S MOTION TO STRIKE REQUEST FOR CLASS
CERTIFICATION**

I, Robin Moore, after first being duly sworn, deposes and says:

1. My name is Robin Moore. I am currently employed by AT&T Operations as Manager, Customer Advocacy. In my position, I provide services to several AT&T entities, including BellSouth Telecommunications, Inc. d/b/a AT&T South Carolina. My current business address is in Nashville, Tennessee.
2. The following statements are based upon my personal knowledge and/or upon my personal review of certain business records and the information they contain. The following documents referenced herein and any documents which I have reviewed in order to provide this testimony, are reports, records or data compilations, made at or near the time by, or from information transmitted by, persons with knowledge, and are kept in the normal course of business.
3. I have reviewed the Complaint filed by Ms. Sandi Perry in Docket Number 2008-415-C before the Public Service Commission of South Carolina

("Commission") as well as Ms. Perry's Reply and Amendments sent by email to the Commission on January 6, 2009. I have also reviewed AT&T South Carolina's Answer and its Motion to Strike Request for Class Certification.

4. The \$50 rebate card provided to Ms. Perry by AT&T South Carolina is a VISA gift card that was available to qualifying customers subscribing to certain Internet services.
5. The \$5 payment convenience fee is charged to customers paying their telephone bill by telephone with the assistance of a customer service representative.
6. Customers receiving a VISA gift card are not limited to using the gift card to pay their telephone bill by telephone, and in fact customers can use the gift card anywhere VISA is accepted.

THE AFFIANT FURTHER SAYETH NAUGHT.

Robin Mooke
AFFIANT

Sworn to and subscribed before me this

4th day of February, 2008.

Susan D. Harris

NOTARY PUBLIC

My Commission Expires:

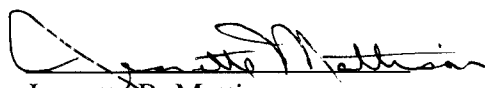
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Jeanette B. Mattison